"Objection, Your (To Your Social Media Activity?)

Congratulations! You have either been elected/appointed a judge of the New York State Court System, or appointed a federal judge of the United States. You have taken your oath/affirmation,[1] donned the black robe, and ascended the bench. Now, for the big questions. Not how to decide a particular case. No, for the purposes of this article the big questions now posed to you are:

> **What do you do about your social media accounts and posts? And, do they result in your having to recuse in more cases than the average judge not on social media?**
>
> ***The answer is "It depends."***

What is the content of the particular social media post? What is the relation to a case pending before the judge, if at all? Who are the "friends" of the judge on social media, and what is the nature of the communications with those "friends," if any? These, and other inquiries, form the basis for evaluating any challenge to the social media posts of a judicial officer.[2] In addition, look to the codes of ethics:

> A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved . . . . A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.[3]

First of all, a judge is not forbidden from having social media accounts. New York ethics opinions have specifically held that there is nothing inherently improper about a judge utilizing social media.[4] However, these opinions have also advised that judges should take care concerning appearances of impropriety, should stay abreast of changes in technology that may impact the judge's duties under the Rules, and should consider whether online connections and friendships in combination with any other factors create a circumstance for recusal.[5] Judges should evaluate if they can be fair and impartial – such as in situations where the contact is happenstance or coincidental, similar to being members of the same professional, civic or social organizations as an attorney appearing before them. Indeed, the Maryland Judicial Ethics Committee once stated it best: "[a]ttorneys are neither obligated nor expected to retire to hermitage upon becoming a judge."[6]

What about when a judge affirmatively posts to social media, and those posts raise eyebrows? Take the case of an Ohio Supreme Court Justice, who at the time of his posts was also a candidate for governor in Ohio, making headlines for two separate social media posts. In one, he spoke out against the NFL players who were kneeling during the National Anthem, saying he would "NEVER attend a sporting event where the draft dodging millionaire athletes disrespected the veterans who earned them the right to be on that field. Shame on you all." [7] In a second post, some months later, in the wake of the sexual harassment scandal reaching Sen. Al Franken's office, the judge posted what he said was related to the

> national feeding frenzy about sexual indiscretions . . . . As a candidate for Governor let me save my opponents some research time . . . In the last fifty years I was sexually intimate with approximately 50 very attractive females . . . . Now can we get back to discussing legalizing marijuana and opening the state hospital network to combat the opioid crisis.[8]

At the time of this writing, there are some calling for the judge to withdraw from the race for governor (which he said he would do in any event if another potential candidate, whom he named, entered the race), or even for the judge to step down from the bench, though no official action appears to have yet been taken. Because of the backlash, including from the state's chief justice, the social media post was deleted, but the judge later posted new comments.[9] The Ohio Chief Justice is quoted as stating: "No words can convey my shock, . . . This gross

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Honor"

By Professor Michael L. Fox

disrespect for women shakes the public's confidence in the integrity of the judiciary."[10]

Then there is the case of a Gwinnett County, Georgia, magistrate judge. The judge posted on social media, in the wake of the Charlottesville protests:

> It looks like all the snowflakes have no concept of history . . . . It is what it is. Get over it and move on. Leave history alone – those who ignore history are deemed [sic] to repeat the mistake [sic] of the past. In Richmond VA all of the Confederate monuments on Monument Ave. have people on horses whose asses face North. PERFECT! [11]

The judge made a follow-up post comparing the protesters wanting to take down the monuments to ISIS destroying history. The chief magistrate judge initially suspended the judge, making the following statement:

> As Chief Magistrate Judge, I have made it clear to all of our judges that the Judicial Canons, as well as our internal policies, require judges to conduct themselves in a manner that promotes public confidence in the integrity, impartiality and fairness of the judiciary, . . . I consider any violation of these principles and policies to be a matter of utmost concern.[12]

The judge later offered his resignation/retirement.[13]

Several other incidents – sitting judges, judicial candidates and nominees posting on all manner of social and political topics – have made headlines and raised questions.[14] But, in one very recent matter before the Florida Third District Court of Appeal, the court addressed a law firm's petition for a trial judge to recuse from a case because she was Facebook friends with an attorney for a non-party who had entered an appearance. The firm contended that the judge would be influenced by the social media friendship.[15] We know from our earlier discussion that in New York, and other jurisdictions, the mere occurrence of a "friendship" on social media is not sufficient to force recusal of a judge – any more than a "friendship" or "acquaintance relationship" that develops through repeated contacts at bar association and social functions would force recusal. A recent news article reported that of the 11 states that have issued rules/guidance for judges on social media, Florida's are most restrictive.[16] The Third District Court of Appeal, though, in a decision issued in August 2017, broke with a prior Florida appellate court ruling and ethics opinion, finding recusal was not required.

The court first noted that, stemming from pre-social media days, "as a general matter, . . . 'allegations of mere "friendship" with an attorney or an interested party have been deemed insufficient to disqualify a judge.'"[17] The court then recounted the prior decision of the Fourth District Court of Appeal (which cited Florida Judicial Ethics Advisory Committee Opinion 2009–20), which held that a judge who was Facebook friends with a prosecutor on a case had to recuse.[18] The *Herssein* court discussed the Fifth District Court of Appeal decision in *Chace v. Loisel*, in which that court held a trial judge was required to recuse from a matrimonial action when the judge sent a friend request to the litigant-wife during the pendency of the case (which the wife did reject), although the *Chace* court at the same time cast doubt on the Fourth District's *Domville* holding.[19] The *Herssein* court held that "'[a] Facebook friendship does not necessarily signify the existence of a close relationship.' . . . 'some people have thousands of Facebook "friends."'"[20] The *Herssein* court also reasoned that "Facebook members often cannot recall every person they have accepted as 'friends' or who have accepted them as 'friends.'"[21] Finally, the court stated: "many Facebook 'friends' are selected based upon Facebook's data-mining technology rather than personal interactions."[22] Therefore, the *Herssein* court ultimately concluded as follows:

> To be sure, some of a member's Facebook "friends" are undoubtedly friends in the classic sense of person for whom the member feels particular affection and loyalty. The point is, however, many are not . . . . In fairness to the Fourth District's decision in *Domville* and the Judicial Ethics Advisory Committee's 2009 opinion, electronic social media is evolving at an exponential rate. Acceptance as a Facebook "friend"

> may well once have given the impression of close friendship and affiliation. Currently, however, the degree of intimacy among Facebook "friends" varies greatly. The designation of a person as a "friend" on Facebook does not differentiate between a close friend and a distant acquaintance. Because a "friend" on a social networking website is not necessarily a friend in the traditional sense of the word, we hold that the mere fact that a judge is a Facebook "friend" with a lawyer for a potential party or witness, without more, does not provide a basis for a well-grounded fear that the judge cannot be impartial or that the judge is under the influence of the Facebook "friend." On this point we respectfully acknowledge we are in conflict with the opinion of our sister court in *Domville*. Petition denied.[23]

It appears from a recent news report that the law firm has now appealed the matter to the Florida Supreme Court,[24] although as of the time of this writing there is no indication of a further appeal or decision on Westlaw.

There have been two interesting opinions/proceedings in New York State. In 2013, a New York State judge asked the Advisory Committee on Judicial Ethics whether the judge had to recuse from a criminal trial at the request of the defendant's attorney or the defendant because the judge was Facebook friends with the parents or guardians of minors allegedly affected by the defendant's activities.[25] The opinion held Facebook friend status alone was not sufficient for recusal, and the judge's impartiality was not reasonably in question. There was thus no appearance of impropriety.[26] Per the opinion:

> The Committee believes that the mere status of being a "Facebook friend," without more, is an insufficient basis to require recusal. Nor does the Committee believe that a judge's impartiality may reasonably be questioned (see 22 NYCRR 100.3[E][1]) or that there is an appearance of impropriety (see 22 NYCRR 100.2[A]) based solely on having previously "friended" certain individuals who are now involved in some manner in a pending action . . . . As the Committee noted in Opinion 11-125, interpersonal relationships are varied, fact-dependent, and unique to the individuals involved. Therefore, the Committee can provide only general guidelines to assist judges who ultimately must determine the nature of their own specific relationships with particular individuals and their ethical obligations resulting from those relationships. With respect to social media relationships, the Committee could not "discern anything inherently inappropriate about a judge joining and making use of a social network" (Opinion 08-176). However, the judge "should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network . . . [and] must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a . . . relationship requiring disclosure and/or recusal" (*id.*). If, after reading Opinions 11-125 and 08-176, you remain confident that your relationship with these parents or guardians is that of a mere "acquaintance" within the meaning of Opinion 11-125, recusal is not required. However, the Committee recommends that you make a record, such as a memorandum to the file, of the basis for your conclusion . . .[27]

In December 2016, the New York State Commission on Judicial Conduct issued its determination in a rather extreme case – *In re the Proceeding Pursuant to Section 44, Subdivision 4, of the Judiciary Law in Relation to Lisa J. Whitmarsh, a Justice of the Morristown Town Court, St. Lawrence County*.[28] In that case, the town justice had posted comments to Facebook concerning an ongoing prosecution before a different town court. The posts were made between March 13 and March 28, 2016. The determination set forth, in part, the following, which is quoted at length because of its importance to the subject of this article:

> Respondent had approximately 352 Facebook "friends." [sic] Respondent's Facebook account privacy settings were set to "Public," meaning that any internet user, with or without a Facebook account, could view content posted on her Facebook page . . . On March 13, 2016, respondent posted a comment to her publicly viewable Facebook account, . . . criticizing the investigation and prosecution of [defendant]. Respondent commented, inter alia, that she felt "disgust for a select few," that [defendant] had been charged with a felony rather than a misdemeanor because of a "personal vendetta," that the investigation was the product of "CORRUPTION" caused by "personal friends calling in personal favors," and that [defendant] had "[a]bsolutely" no criminal intent . . . Respondent's post also referred to her judicial position, stating, "When the town board attempted to remove a Judge position – I stood up for my Co-Judge. When there is a charge, I feel is an abuse of the Penal Law – I WILL stand up for [DEFENDANT]" [sic] [emphasis in original] . . . Other Facebook users posted comments on respondent's Facebook page, commending respondent's statements in her post of March 13, 2016, and/or criticizing the prosecution of [defendant]. The first Facebook user to comment was Morristown Town Court Clerk [ ], who posted the following on March 13, 2016, at 7:58 AM: "Thank you Judge [ ]! You hit the nail on the head." Respondent did not delete the court clerk's comment, which was viewable by the public . . . On March 23, 2016, a local news outlet posted an article on its website reporting on respondent's Facebook comments . . . and re-printed respondent's Facebook post of March 13, 2016, in its entirety . . . On March 28, 2016, respondent removed all postings concerning the [ ] matter from her Facebook page after receiving a letter from [the] District Attorney [ ] questioning the propriety of her

> comments and requesting her recusal from all matters involving the District Attorney's office.[29]

The Commission determined that the respondent town justice had "violated Sections 100.1, 100.2(A), 100.2(C) and 100.3(B)(8) of the Rules Governing Judicial Conduct . . . and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law."[30] The Commission further determined that posts to Facebook are public, cannot be considered private in any sense, and "[a]ccordingly, a judge who uses Facebook or any other online social network 'should . . . recognize the public nature of anything he/she places on a social network page and tailor any postings accordingly."[31] The Commission rightfully pointed out that:

> [w]hile the ease of electronic communication may encourage informality, it can also, as we are frequently reminded, foster an illusory sense of privacy and enable too-hasty communications that, once posted, are surprisingly permanent. For judges, who are held to "standards of conduct more stringent than those acceptable for others" . . . and must expect a heightened degree of public scrutiny, internet-based social networks can be a minefield of "ethical traps for the unwary."[32]

Ultimately, the town judge was given an admonition as a sanction.

Finally, there is the very recent case out of the Town of Floyd (Oneida County). There, the town justice, who had been serving since 1999, agreed to resign on December 31, 2017, as part of a stipulation with the New York State Commission on Judicial Conduct. At the time of this writing, the resolution of the matter was newly reported, and not much detail was available. However, it appears that the judge (who also served as a justice in two village courts), "conveyed bias in favor of law enforcement and against a political organization," and also criticized gun regulations, on Facebook.[33] More detail was not available, although the remarks, it was reported, were made in November.[34] The outcome in this case was more severe than that in the Morristown Town Court matter above. In the Town of Floyd matter, the judge also agreed "to neither seek nor accept judicial offices in the future."[35] The Commission's administrator provided a short statement, which sums up this article perfectly, and should be taken to heart by all elected

and appointed judges: "On social media as anywhere, a judge must uphold the integrity and impartiality of the judiciary, and avoid conduct that conveys or appears to convey bias for or against particular political, religious or other groups."[36]

In conclusion, although judges can use social media, and certainly may have "friends" both on and off social media, judicial officers (as well as candidates for judicial office, judicial nominees, and attorneys), should be very cautious when it comes to social media friendships and postings.[36] Judges and attorneys are not only private citizens, they are also public officers, officers of the court, and under oath to uphold the integrity and impartiality of the law and the justice system. That requires more than a passing thought before hitting "Tweet" or "Share."[38]

1. *See* 28 U.S.C. § 453 (oath of office taken by all U.S. justices and judges); *see also* N.Y. Const. Art. XIII, § 1 (oath of office taken by the New York State executive, legislators and justices/judges). It is interesting to note that once the oath is taken and filed along with the commission, it is a public record, and a judge need not produce a certified copy of same to satisfy a litigant that the oath was properly taken, and to discharge judicial duties (*In re Anthony*, 481 B.R. 602, 613–14 (D. Neb. 2012)). It is further interesting to note that had New Yorkers answered 2017 ballot Proposition 1 in the affirmative, and called for a Constitutional Convention, the delegates to that convention would have taken the state oath of office. See Notes of Decisions to N.Y. Const. Art. XIII, § 1; Op. Atty. Gen. 202 (1938).

2. While this article does not specifically address the obligations of, and rules governing, attorneys on social media, keep in mind that there are numerous rules and guidelines to be aware of before embarking on social media. *See, e.g.*, *Social Media Ethics Guidelines of the Commercial & Federal Litigation Section of the New York State Bar Association* (updated 2017), www.nysba.org/socialmediaguidelines17. For two cautionary tales, *see* D. Weiss, *Penn State Frat Prosecutor Faces Ethics Hearing Over Fake Facebook Page, Texts to Judges*, ABA Journal, www.abajournal.com/news/article/penn_state_frat_prosecutor_faces_ethics_hearing_over_fake_facebook_page_all (Aug. 22, 2017); D. Weiss, *CBS Fires Lawyer Over Facebook Posts Calling Vegas Shooting Victims Likely 'Republican Gun Toters*,' ABA Journal, www.abajournal.com/news/article/cbs_fires_lawyer_over_facebook_comments_calling_vegas_victims_likely_republ/ (Oct. 2, 2017). Separately, there are concerns about making clear to jurors that, while they are serving and deliberating, they are not to utilize social media. *See U.S. v. Ganias*, 755 F.3d 125, 132–33 (2d Cir. 2014).

3. Code of Conduct for United States Judges, Canons 1 & 2(A). *See also* 22 N.Y. Comp. Codes R. & Regs. §§ 100.1, 100.2(A), 100.3. *See generally*, A. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 Wash. L. Rev. 851, 854 (1989) ("Indeed, the basic rule of the Code of Conduct, the one to which all other rules are mere commentary, reflects this concern: judges should avoid not only impropriety but also the appearance of impropriety in all things relating to their office").

4. See New York Opinions 08-176 (2009) and 11-125 (2011). *See also* ABA Formal Op. 462 (2013).

5. *Id*.

6. *See* Maryland Judicial Ethics Committee Op. Request No. 2012-07 (2012).

7. J. Delk, *Ohio Judge Slams Cleveland Browns Players for Protesting During National Anthem*, The Hill, http://www.thehill.com/homenews/347974-ohio-supreme-court-justice-criticizes-cleveland-browns-players-national-anthem/ (Aug. 25, 2017) (the article notes that the draft ended in 1973, and therefore none of the NFL players are actually draft-dodgers).

8. L. Bever & M. Eltagouri, *Ohio Governor Candidate Apologizes for Boasting of Sexual History With '50 Very Attractive Females*,' The Washington Post, www.washingtonpost.com/ news/politics/wp/2017/11/17/ohio-governor-candidate-boasts-of-sexual-history-with-approximately-50-very-attractive-females/?utm_term=.f4e0214e023c/ (Nov. 18, 2017). The social media post included details describing several women such that they might be identifiable, and those descriptions are not repeated here.

9. *Id*.

10. *Id*.

11. D. Weiss, *Magistrate Judge Retires After Facebook Comments About 'Snowflakes' and 'Nut Cases*,' ABA Journal, www.abajournal.com/news/article/magistrate_judge_retires_after_his_ facebook_comments_about_nut_cases_tearin/ (Aug. 18, 2017).

12. C. O'Brien, *Gwinnett Magistrate Judge Suspended Over Facebook Post About Charlottesville, Va. Protesters*, Gwinnett Daily Post, www.gwinnettdailypost.com/local/gwinnett-magistrate-judge-suspended-over-facebook-post-about-charlottesville-va/article_672ba1c8-07be-5edd-9e67-6a66be9bfc1d.html (Aug. 15, 2017).

13. *See* D. Weiss, *Magistrate Judge Retires After Facebook Comments About 'Snowflakes' and 'Nut Cases*,' *supra*.

14. For brief descriptions of other instances, *see* C. Ampel, *Watch Your Mouth, Your Honor: Lessons for Judges on Social Media*, N.Y.L.J. (Aug. 28, 2017), www.law.com/newyorklawjournal/almID/1202796679106/?slreturn=20171029093202/.

15. D. Weiss, *Appeals Court Considers Removal of Judge Who Is Facebook Friends with Lawyer*, ABA Journal, www.abajournal.com/news/article/appeals_court_considers_removal_of_judge_who_is_facebook_friends_with_lawye/ (July 31, 2017).

16. *See* D. Weiss, *Judge Shouldn't Be Booted From Case Because of Facebook Friendship with Lawyer, Appeals Court Rules*, ABA Journal, www.abajournal.com/news/article/judge_shouldnt_be_booted_from_case_because_of_facebook_friendship_with_lawy/ (Aug. 25, 2017).

17. *Law Offices of Herssein & Herssein, P.A. v. U. Serv. Auto. Assoc.*, 229 So.3d 408, 2017 WL 3611661 (Fla. App. 3d Dist. Aug. 23, 2017) (citing *Smith v. Santa Rosa Island Auth.*, 729 So.2d 944, 946 (Fla. App. 1st Dist. 1998); *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332, 1338 (Fla. 1990) ("There are countless factors which may cause some members of the community to think that a judge would be biased in favor of a litigant or counsel for a litigant, e.g., friendship, member of the same church or religious congregation, neighbors, former classmates or fraternity brothers. However, such allegations have been found legally insufficient when asserted in a motion for disqualification")).

18. *Herssein*, 2017 WL 3611661, at *2 (citing *Domville v. State*, 103 So.3d 184 (Fla. App. 4th Dist. 2012); Fla. JEAC Op. 2009–20 (Nov. 17, 2009)).

19. *Herssein*, 2017 WL 3611661, at *2–3 (citing *Chace v. Loisel*, 170 So.3d 802, 803–04 (Fla. App. 5th Dist. 2014)).

20. *Herssein*, 2017 WL 3611661, at *3 (citing *Sluss v. Commonwealth*, 381 S.W.3d 215, 222 (Ky. 2012); State v. Madden, No. M2012-02473-CCA-R3-CD, 2014 WL 931031, at *1–2 (Tenn. Crim. App. Mar. 11, 2014)).

21. *Herssein*, 2017 WL 3611661, at *3 (citing *Furey v. Temple Univ.*, 884 F. Supp. 2d 223, 241 (E.D. Pa. 2012); *Slaybaugh v. State*, 47 N.E.3d 607, 608 (Ind. 2016)).

22. *Herssein*, 2017 WL 3611661, at *4.

23. *Id*.

24. *See Law Firm Asks: Does Facebook Friendship Disqualify Judge?*, CBS News, http://www.dfw.cbslocal.com/2017/10/18/does-facebook-friendship-disqualify-judge/ (Oct. 18, 2017).

25. *See* New York Opinion 13-39 (2013).

26. *Id*.

27. *Id*.

28. 2016 WL 7743777 (N.Y. Com. Jud. Cond. Dec. 28, 2016).

29. *Id*.

30. *Id*.

31. *Id*. (citing N.Y. Opinion 08-176).

32. *Id*. (citing, *inter alia*, J. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, 68 U. Miami L. Rev. 487, 511 (2014)).

33. J. Velasquez, *Town Justice Resigns After Probe of His Facebook Remarks*, N.Y.L.J., www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/12/18/town-justice-resigns-after-probe-of-his-facebook-remarks/ (Dec. 18, 2017).

34. *Id*.

35. *Id*.

36. *Id*.

37. Judges should further be cautious before using social media or the internet to research cases, attorneys, parties or potential jurors. For a full discussion, see recent ABA Formal Opinion 478 (Dec. 8, 2017) (citing, *inter alia*, Rule 2.9(C) of the Model Code of Judicial Conduct, which prohibits online research and information gathering about a juror or party)..

38. As stated by the Gwinnett County Chief Magistrate Judge in accepting the resignation of one of the judges discussed above: "My decision to accept Judge [ ]'s resignation is not a comment on his personal opinions; he is entitled to those, . . . While, thankfully, our Constitution protects the right of all citizens to express their opinions, Judges are held to a more stringent standard by the Judicial Canons." T. Estep, Gwinnett Judge Resigns After Controversial Confederate Monument Posts, The Atlanta Journal-Constitution, www.ajc.com/news/local-govt-politics/gwinnett-judge-resigns-after-controversial-confederate-monument-posts/eO1o7wMa0zUNoa7IGz4YZK/ (online, Aug. 16, 2017).